FILED
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HAROLD B. WILL

No. 501

In The

Supreme Court of The United States

October Term, 1955

CAMMIE B. HOLMAN,

Appellant,

v.

GUERDON M. MATTHEWS, Commissioner of Banks of State of Wisconsin,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO DISMISS AND SUPPORTING BRIEF

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MOTION TO DISMISS

TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Now comes the appellee Guerdon M. Matthews, Commissioner of Banks of the State of Wisconsin, by Vernon W. Thomson, Attorney General of Wisconsin, and moves the court, pursuant to paragraph 1. (b) of Rule 16 of the Rules of the Supreme Court of the United States, to dismiss the appeal herein on the ground that it does not present a substantial federal question.

Dated this 23rd day of November, A. D. 1955.

VERNON W. THOMSON,
Attorney General of Wisconsin,

STEWART G. HONECK,
Deputy Attorney General,

ROY G. TULANE,
Assistant Attorney General,

Attorneys for Appellee.

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BRIEF OF APPELLEE IN SUPPORT OF MOTION TO DISMISS

This brief in support of the motion to dismiss is filed in accordance with permission granted in Rule 35, paragraph 1 of the Rules of the Supreme Court of the United States.

NATURE OF THE CASE

This is an appeal by Cammie B. Holman from a judgment of the Supreme Court of the State of Wisconsin entered on June 28, 1955, reported in 270 Wis. 453, 71 N. W. 2d 368 (1955).

STATEMENT OF FACTS

The statement of facts set forth in the opinion of the Wisconsin Supreme Court, appendix C to appellant's statement, together with the references to the record in that opinion, present an accurate summary of all material facts necessary to an analysis of the issues raised by this appeal.

The material facts as shown in appellant's statement appear to be accurate other than in those cases where they are obviously conclusions of law which were not accepted by the Wisconsin Supreme Court.

We particularly direct attention to that portion of the Wisconsin Supreme Court opinion set forth at pages 64 to 66 of appellant's statement, where the court, analyzing the relationship of Mr. Cammie B. Holman to the Metropolitan Finance Corporation, definitely points out that he is an agent of that firm and that hence the finance corporation is doing business in the State of Wisconsin as a collection agency.

ARGUMENT

I.

NONDISCRIMINATORY POLICE REGULATIONS OF THE ACTIVITIES OF SOLICITORS, OPERATING IN WISCONSIN ON BEHALF OF AN OUT - OF - STATE COLLECTION AGENCY WHICH THEREAFTER SEEKS TO EFFECTUATE COLLECTIONS BY MAIL, DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

The appellant Cammie B. Holman bases his claim of jurisdiction on the main ground that since his principal, the Metropolitan Finance Corporation (a collection agency) of Kansas City, Missouri, is engaged in interstate commerce, an attempt by the state to regulate his activities in any manner is a violation *per se* of Art. I, sec. 8, Clause 3 of the United States Constitution, which vests in the Congress the power "To regulate commerce * * * among the several states."

The state claims that its statute challenged herein, sec. 218.04, is purely a police regulation and in no wise a revenue measure, that it does not in any way discriminate against interstate commerce, and hence is clearly valid under the most recent and carefully considered decisions of this court.

For the sum of $2 the appellant can obtain a license which entitles him to roam the entire state 365 days out of the year on an equal footing with solicitors acting as agents for Wisconsin collection agencies.

For a nominal fee which in general barely covers the cost of examination, his principal, the Metropolitan Finance Corporation, can become licensed to do business in Wisconsin.

Appellant has made no attempt to show that the state statute complained of is discriminatory against him; that is, he has neither pleaded nor offered proof of facts which would tend to show that the statute is any more burdensome on him than it is on solicitors who are residents of Wisconsin and operate on behalf of Wisconsin agencies which must obtain their business through solicitation. Hence, he has failed to comply with the rule that one who would attack the constitutionality of a statute must plead and prove the facts to show that it is unconstitutional as to him.

Holman's failure to charge discrimination may be accepted as a concession that none exists, and that he is relying on a claim of complete immunity from state control of any activities related to interstate commerce.

This doctrine, which appears to find support both in dicta and the rulings in some early court opinions, has now been thoroughly repudiated by the most recent and carefully considered decisions of this court.

Breard v. City of Alexandria, (1951) 341 U. S. 622,

Robertson v. California, (1946) 328 U. S. 440;

McGoldrick v. Berwind-White Co., (1940) 309 U. S. 33;

Nippert v. Richmond, (1946) 327 U. S. 416;

Union Brokerage Co. v. Jensen, (1944) 322 U. S. 202;

California v. Thompson, (1941) 313 U. S. 109;

Hartford Accident & Indemnity Co. v. Illinois, (1936) 298 U. S. 155.

There are two cases alone which we respectfully suggest to the court have so completely covered the issues raised by appellant in this appeal, that no further opinion of the court would appear necessary; these are *Breard v. Alexandria* and *Robertson v. California.* In the *Breard* case the court held that a municipal ordinance which flatly prohibited commercial solicitors from calling upon occupants of private dwellings without having been requested to do so was not violative of the commerce clause, among others. At page 638 of its opinion the court recognized that such solicitation had been considered to be immune from state taxation and licensing in the past and continued:

> "* * * These decisions have been explained by this Court as embodying a protection of commerce against discrimination made most apparent by fixed-sum licenses regardless of sales. Where the legislation is not an added financial burden upon sales in commerce or an exaction for the privilege of doing interstate commerce but a regulation of local matters, different considerations apply."

On the same page the court pointed out that the case of *Nippert v. Richmond,* supra, struck down taxation that threatened interstate commerce with prohibition.

The case of *Robertson v. California,* supra, involved the validity of statutes of the State of California which required insurance agents soliciting applications for insurance in California which were thereafter transmitted in

interstate commerce to obtain a license, and also to act only as agent for insurers admitted to do business in California. This case is of controlling weight since the acts of the insurance agents concerned take place in the period after the decision in *United States v. Southeastern Underwriters Association,* (1924) 232 U. S. 533, which held insurance to be commerce and prior to the passage of the McCarran Act which restored to the states jurisdiction over the sales of insurance. In the *Robertson* case the specific contention was made that the insurance contracts were negotiated in interstate commerce, and that the state could not require a license for such purpose. This court upheld the California statute, and stated in part at page 447 of its opinion:

> "We accept the regulation for what it purports to be on its face and by the statute's express declaration, namely, a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. * * *
>
> "Such being the purpose and effect of paragraph 1642, there can be no substantial question concerning its validity on commerce clause grounds."

Identical considerations apply to the Wisconsin collection agency law under consideration herein. It is intended solely as a police measure to protect the people of Wisconsin, both debtors and creditors, from misrepresentation, sharp practices, and outright fraud in the collection agency business.

The *Robertson* case together with the *Breard* case and the other cases cited above would appear to be a complete answer to appellant's present contentions. In addition to the foregoing, there are complete discussions and analyses of this problem in the *McGoldrick v. Berwind-White* and the *Nippert v. Richmond* cases, supra. We commend these entire opinions to the court's attention.

The so-called "drummer cases" on which appellant relies, starting with *Robbins v. Shelby County Taxing District,* (1887) 120 U. S. 489, running down through *Nippert v. Richmond,* supra, and reaffirmed in principle in *Memphis Steam Laundry, Inc. v. Stone,* (1952) 342 U. S. 389, by now have clearly established that the license taxes outlawed in the drummer cases were outlawed because they discriminated against interstate commerce, and it was believed in most cases that they were designed to do so.

The case of *International Textbook Company v. Pigg,* (1910) 217 U. S. 91, heavily relied on by appellant herein and below, was neither a drummer case nor a tax case, but an attempt to exclude a corporation lawfully engaged in interstate commerce from the courts of a particular state, and hence is completely distinguishable both from the drummer cases and from a case such as the one now before the court, which involves a nondiscriminatory, purely police regulation.

II.

THE CONGRESS HAS NOT PREEMPTED THE FIELD.

We respectfully submit to the court that the many decisions in cases wherein this issue has been considered have clearly established the rule for determining when Congress has preempted a particular field of legislation so that a state can no longer act.

That rule is that an intention by Congress to override the state police powers as to matters not covered by the federal legislation is not to be implied unless the federal legislation fairly interpreted is in actual conflict with the state law.

A comparison of the scanty language of the Federal Trade Commission Act with the detailed provisions of the Wisconsin Collection Agency Law, and a realization of the essentially local nature of the solicitation of accounts for collection from debtors to creditors who almost always reside in the same state, is sufficient indication that the Congress never dreamed that the Federal Trade Commission law would deprive states of the power to protect their own citizens in essentially local matters.

Townsend v. Yeomans, (1937) 301 U. S. 441;

Savage v. Jones, (1912) 225 U. S. 501;

Allen-Bradley v. Wisconsin Employment Relations Board, (1941) 315 U. S. 740.

CONCLUSION

We respectfully submit that the motion to dismiss should be granted on the ground that no substantial federal question exists.

We respectfully suggest that the subject before the court, that is, the alleged burden on interstate commerce, has been so exhaustively analyzed in the recent cases we have quoted herein, that further consideration would serve no useful purpose.

We further submit that appellant has in no way met that analysis in any manner sufficient to cast doubt on its validity.

Finally, an intention of the Congress to invade the states' powers in matters essentially local is not likely to be presumed in the absence of a clear expression of the intention of the Congress itself.

Respectfully submitted,

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Deputy Attorney General,

ROY G. TULANE,
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November 23, 1955.